(34)

No. 1020

Supreme Court of the United States

October Term, 1944

JEFFERSON COUNTY, TENNESSEE,
Petitioner,

vs.

TENNESSEE VALLEY AUTHORITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. ———.

JEFFERSON COUNTY, TENNESSEE,
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vs.

TENNESSEE VALLEY AUTHORITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

I

SUMMARY STATEMENT OF MATTERS INVOLVED.

The issue presented to the Court by this petition is whether or not the United States, its agencies and corporations, are required by the Fifth Amendment to the Constitution to pay just compensation for taking highways belonging to a municipal arm of the State of Tennessee; and, if so, the measure of value where the owner of the highway is under no duty or obligation to its citizens to replace the highways taken.

There are no disputed material questions of fact.

The petitioner is Jefferson County, Tennessee, a body corporate under the laws of Tennessee and a municipal arm of Tennessee. The respondent, Tennessee Valley Authority, is a corporation created by Congress, with power to sue and be sued (R. 1; 15).

The waters of the French Broad River flow through Jefferson County. The Tennessee Valley Authority constructed a dam impounding the waters of the French Broad River. The impounded waters flooded approximately 123 miles of highway owned by petitioner. (R. 1; 2; 15).

Approximately 28 miles of highways and bridges required reconstruction after the flooding. The remaining 95 miles of highways did not require replacement. (R. 42).

The petitioner and respondent entered into a contract (R. 5-11) settling the liability of the respondent to petitioner for highways requiring reconstruction. Respondent denied any liability for highways taken where no reconstruction was necessary. The issue between the parties as to highways taken where no reconstruction was necessary was thus stated in the contract between them:

> "It is the contention of the Authority (respondent) that it is not legally liable for the taking of any such right-of-way or road and that no provable damage arises from any such taking; while the County (petitioner) contends that it suffers substantial damage due such taking for which the Authority is liable";

and the contract further provided:

> —"Nothing in this agreement shall operate to release any such right or be plead in defense to any suit brought by the County to recover damages for any such taking". (R. 10(10)).

The petitioner brought an action against the respondent in the United States District Court seeking a declaration of

its rights and a determination of the measure of value of its property taken from it by respondent. Motions for summary judgment, supported by affidavits, were filed by both parties. These affidavits make clear (a) that petitioner is under no continuing obligation to replace the roads or highways for which this action was brought (R. 21); (b) that these roads had a replacement value at the time taken of $357,658.00 (R. 22), and an original cost of $186,000.00 (R. 22) plus improvements costing $250,000.00 (R. 26); (c) that the highways were used by and useful to the petitioner at the time taken (R. 25); (d) that all roads requiring repair or replacement had been repaired or replaced under the contract between the parties. (R. 25).

The District Court sustained the motion of respondent holding that respondent was not liable to petitioner for the value of the property of petitioner taken by respondent where petitioner was under no obligation to replace the property so taken. (R. 42).

Upon appeal, the Circuit Court of Appeals for the Sixth Circuit affirmed the action of the District Judge (R. 49), holding that since respondent had paid the cost of reconstructing 28 miles of road for which there was a continuing need, and since there was no continuing need for the remaining 95 miles of highways taken, petitioner was entitled to take nothing by its action. (R. 52).

The narrow issue remains: May the United States, through any of its agencies, take the property of a municipal arm of a state without compensation because the future usefulness of the property taken has been destroyed by the taking agency and the municipality is under no continuing obligation to replace the property taken?

II

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (A) of the Judicial Code (28 U. S. C. 347). The Circuit Court of Appeals has in this case decided an important question of Federal law which has not, but should be decided by this Court (Supreme Court Rule 38 (5) (b)), and has decided this question in a way which is probably in conflict with the applicable principles decided by this Court (Supreme Court Rule 38 (5) (b)).

Judgment was entered in this case by the United States Circuit Court of Appeals on January 15, 1945. (R. 49).

III

THE QUESTIONS PRESENTED.

1. Where the United States, its agencies or corporations, take roads or highways owned by a municipality, the Fifth Amendment to the Constitution requires the payment of just compensation for the property taken.

2. Just compensation is not predicated upon the obligation or duty of the municipality to replace the roads or highways so taken but is measured by value at the time taken.

3. The cogent evidence of value where service property of a municipality is taken is cost of replacement, and where no duty of restoration or replacement rests upon the municipality, just compensation is best measured by cost of replacement of similar property.

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. This case involves an important question of Federal Law which has not been but should be settled by this Court. (Rule 38-5 (b)).

More and more Federal agencies are taking highways of States and their subordinate municipal arms. While the law seems to be settled that streets and highways are property which may not be taken by a Federal agency without the payment of just compensation (*St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92), the question as to what constitutes just compensation for such a taking has not been decided in a direct holding of this Court.

Is it the value of the surface area of the highway as apparently decided in *Benedict* v. *U. S.* 280 F. 76? Is it the cost of replacement of a similar highway as decided in *Wayne County* v. *U. S.* 53 Ct. Cls. 417? Where a partial taking of a single road is involved, two circuits seem to hold that the cost of restoring the road to service is the measure of liability: *U. S.* v. *Wheeler Township*, 66 F 2d 977; *Bedford* v. *U. S.*, 23 F 2d, 453. This Court has recognized the right of the United States to provide by contract for the replacement of all roads of a municipality in *Brown* v. *U. S.*, 263 U. S. 78. However, in addition to the holding in this case, two other district courts have held that where there is no duty of replacement resting upon the municipality, no compensation is due to it for taking its service properties: *U. S.* v. *Alderson*, 53 F. Supp. 528; *U. S.* v. *Certain Parcels of Land*, 54 F. Supp. 667.

It seems to petitioner that this Court should grant the writ sought in this case and settle this important question. Is loss to the owner in case of municipal service property

predicated upon the necessity of performing a continuing duty? Today such a corporation has service properties costing in excess of $430,000.00, with an actual present replacement value of $357,658.00. Does the Fifth Amendment to the Constitution protect such property only if it must be replaced by the owner?

2. The decision of the Circuit Court of Appeals in this case is probably in conflict with the applicable decisions of this Court. (Rule 38-5 (b)).

This Court has held that a street or highway belonging to a municipality is property which may not be taken by the United States, its agencies or corporations, without payment of just compensation (*St. Louis* v. *Western Union Telegraph Company,* 148 U. S. 92), and has recently reaffirmed the principle that the constitutional requirement of just compensation for the taking of private property for public use is addressed to every sort of interest which the citizen may possess in the physical thing taken (*U. S.* v. *General Motors,* decided January 8, 1945, 89 L. Ed. 379).

While this Court has not decided the measure of just compensation for taking municipal service property, certain principles apparently applicable have been decided.

Value for purposes of just compensation is determined as of the date of taking but value does not include and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking (*Olsen* v. *U. S.* 292 U. S. 246). Conversely, it should be true that value is not diminished nor compensation reduced by any element resulting subsequently to or because of the taking.

Value means the full and perfect equivalent in money of the property taken (*U. S.* v. *Miller,* 317 U. S. 369). Value may reflect the use to which the property is presently devoted (*McCanless* v. *U. S.* 298 U. S. 342; *U. S.* v. *Powelson* 319 U. S. 266, *ibid* p. 275). The test is loss to the owner, not

gain to the taker (*Boston Chamber of Commerce* v. *Boston* 217 U. S. 189).

The decision in this case seems in conflict with these principles. The District Court held "——the defendant (respondent) is not liable to the plaintiff (petitioner) for the taking of roads where the County is under no obligation to replace or reconstruct such roads." (R. 44). The Circuit Court of Appeals sustains the decision of the District Court and in its opinion states that in the case of a political subdivision of a state "just compensation cannot be measured by the same standards as compensation for the taking of purely private property" (R. 51); that while highways are property within the protection of the Fifth Amendment to the Constitution with respect to just compensation, nevertheless, "appellant (petitioner) did not have title to *property susceptible to the ascertainment of fair cash value*" (R. 52), and concludes that all the County was entitled to recover was the cost of restoring highways useful after the construction of the dam by respondent and as that had been paid, petitioner would take nothing by its suit. (R. 52-53).

This decision, while recognizing that this Court has declared highways belonging to a municipality to be property which cannot be taken without payment of just compensation, avoids the recognized principle by denying that such property is susceptible to the ascertainment of fair cash value; while recognizing that every sort of interest which the citizen may possess in the physical thing taken is protected by the Fifth Amendment, denies the application of the principal to municipal service properties by its holding that only those properties which the municipality needs to replace have value when taken under the power of eminent domain. The decision does not fix value at the time of taking in accordance with the recognized principle but looks beyond the taking to elements resulting subsequently to

and because of the taking. Thus "just compensation" to a political subdivision of a state is not "measured by the same standards as is compensation for the taking of purely private property."

It seems to petitioner that this decision is in conflict with the principles of the applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 9840, *Jefferson County, Tennessee, Appellant,* v. *Tennessee Valley Authority, Appellee,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

JEFFERSON COUNTY, TENNESSEE,

By M. W. EGERTON,
Counsel for Petitioner.

Dated February 21, 1945.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I

OPINIONS OF THE COURTS BELOW

The opinions of the District Court are not officially reported. They are found in the record on pages 40-44.

The opinion of the Circuit Court of Appeals is not officially reported. It is found in the record on pages 49-53.

II

JURISDICTION

The jurisdiction of this Court is invoked under Sec. 240 (A) of the Judicial Code (28 U. S. C. 347). The Circuit Court of Appeals has in this case decided an important question of Federal law which has not, but should be decided by this Court (Supreme Court Rule 38 (5) (b)), and has decided this question in a way which is probably in conflict with the applicable principles decided by this Court (Supreme Court Rule 38 (5) (b)).

Judgment was entered in this case by the United States Circuit Court of Appeals on January 15, 1945. (R. 49).

III

STATEMENT OF THE CASE

This case involves the issue whether or not the United States, its agencies and corporations, are required by the

Fifth Amendment to the Constitution to pay just compensation for taking highways belonging to a municipal arm of the State of Tennessee; and, if so, the measure of value where the owner of the highway is under no duty or obligation to its citizens to replace the highways taken.

It arises out of the taking by respondent of 123 miles of highways belonging to petitioner as a result of flooding caused by the construction of a dam by respondent on the French Broad River.

By contract between the parties, approximately 28 miles of highways and bridges were reconstructed or replaced by respondent. The respondent denied liability for taking the remaining 95 miles of highways upon the theory that liability existed only if the owner of the highways could be required to replace them. The contract between the parties reserved this issue for court decision. (R. 10 (10)).

By suit brought in the District Court of the United States for the Eastern District of Tennessee, petitioner sought a declaration of its rights and the measure of just compensation to be applied for the taking of its property by respondent. The respondent answered and motions for summary judgment were filed by both petitioner and respondent.

Affidavits filed in support of these motions show:

(a) That the highways flooded by respondent were the property of petitioner and were used by and useful to it at the time of flooding. (R. 25).

(b) That these highways had a cost of replacement value at the time of taking of $357,658.00; that they cost originally $186,000.00, to which had been added improvements having a value in excess of $250,000.00. (R. 22; R. 26).

(c) That all highways requiring restoration and continuing useful had been restored by respondent at its own expense under the contract between the petitioner and respondent. (R. 25).

The District Court sustained the motion of respondent and held that no liability existed where no restoration could be required of petitioner. (R. 44).

The Circuit Court of Appeals affirmed this holding. (R. 49).

Your petitioner takes the position that this holding denies to petitioner the just compensation to which it is entitled under the Fifth Amendment to the Constitution. If the service properties of a municipality have no value unless there is a continuing need for them, then the greater the actual value taken, the less the liability becomes for the taking. Such a rule introduces a new theory of value and creates unmeasurable confusion.

The established principles require the payment of just compensation measured by value at the time of taking. The new standard proposed in this case for taking municipal service property should be examined by this Court.

IV

ERRORS RELIED UPON

The Circuit Court of Appeals erred in holding that highways are not property susceptible to the ascertainment of fair cash value, and in denying to petitioner the just compensation to which it is entitled under the Fifth Amendment to the Constitution. The Court further erred in holding that liability does not exist for highways taken by a Federal agency except to the extent that the owner may be required to replace the highways taken; and it further erred in holding that in case of a political subdivision just compensation cannot be measured by the same standards as compensation for the taking of purely private property and thereby limiting the liability of respondent to the cost of restoring those highways whose restoration was necessary after the taking had occurred.

V

ARGUMENT

1. This case involves an important question of Federal law which has not been but should be settled by this Court.

In the earlier stages of development of this country, many roads and bridges were constructed by private capital and operated as toll roads. Many of these toll roads and bridges were taken under the power of eminent domain by municipal corporations, and the power of condemnation and measure of value in these cases was the subject of a substantial volume of litigation. (See note 47 L. R. A. (N. S.) 796, *et seq.*)

In Tennessee such a right of condemnation was conferred by Chapter 114 Acts 1917, and sustained in *Williamson Co.* v. *Turnpike Co.* 143 Tenn. 628 (see page 640.).

In such cases physical properties, easements, roadways, bridges, etc. were valued as well as franchise. Income was an important element in the valuation of a franchise. (*Monogahela Navigation Co.* v. *U. S.*, 148 U. S. 312).

But toll roads have largely disappeared, the construction and maintenance of roads now being primarily a service function of states and municipalities. No tolls are charged. Roads are constructed and maintained by public municipal funds ultimately obtained from taxation and thus taxation has supplanted tolls—but physical properties, easements, roadways, bridges, etc. remain physical properties.

Do these physical properties cease to have value when taken by a Federal agency because the owner has substituted taxation for tolls and no direct income for its municipal owner is produced by a highway?

From time to time in the past, roads have been taken from municipal owners by Federal agencies. Always just com-

pensation has been required and paid. That compensation may have been the cost of replacement of a similar road (*Wayne County* v. *U. S.* 53 Ct. Clms. 417); or where a partial taking of a single road was involved, the cost of restoring that road to service (*U. S.* v. *Wheeler Township,* 66 F (2d) 977), (*Bedford* v. *U. S.* 23 F. (2d) 453); or where an unimproved dedicated surface alone was involved, the value of that surface in terms of the value of the surrounding surface (*Benedict* v. *U. S.* 280 F 76); or there may have been a complete substitution of all highways provided for by contract (*Brown* v. *U. S.* 263 U. S. 78); but always compensation was paid.

However, recently, two District Courts (*U. S.* v. *Alderson* 53 F. Supp. 528; *U. S.* v. *Certain Parcels of land,* 54 F. Supp. 667), in addition to the District deciding this case, have denied compensation for the taking of highways upon the theory that such property has no value and the owner suffers no loss unless there is a continuing duty to replace or restore to service the highway taken.

The decision in this case (and the recent District Court cases) finds no support among the textbook writers.

Orgel states the rule to be:

> "In case of non profit making or 'service' properties, cost of replacement is regarded as cogent evidence of value although not as in itself the standard of compensation";
>
> (Orgel on Valuation under Eminent Domain, Sec. 39 p. 122)

and Lewis says:

> "If property has no market value, then it is a question of real or actual value, and every fact bearing upon such value may be shown ———";
>
> (Lewis on Eminent Domain (2nd Ed) Vol. 2, Sec. 478, p. 1052)

and in the recent text American Jurisprudence, it is said:

> "While market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought and sold, as a church or a college or a cemetery or the fee of a public street, or some other piece of property which may have an actual value to the owner, but which under ordinary conditions he would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is sometimes said that such property has no market value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable."
>
> (18 American Jurisprudence, Sec. 247, Eminent Domain)

Thus, the earlier decisions of the lower Federal Courts seem in accord with the text rules, while the later decisions are contrary thereto. The question of just compensation under the Fifth Amendment is a Federal question and where its application to municipal service properties affects so many states and their political subdivisions, it becomes an important question. It has not but should be decided by this Court for the guidance of the public agencies of the states as well as various Federal agencies endowed with the power of eminent domain and now taking public service properties of political subdivisions of the states.

2. The decision of the Circuit Court of Appeals in this case is probably in conflict with the applicable decisions of this Court.

(a) The decision, while recognizing that highways are property within the protection of The Fifth Amendment to the Constitution (R. 51), denies the protection of the Fifth Amendment by holding that highways are not property susceptible to the ascertainment of fair cash value. (R. 52).

It seems impossible to reconcile this holding with the holding of this Court in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92.

If highways are property within the meaning of the Fifth Amendment, then they can be taken only by payment of just compensation. Those things which may be taken without payment of just compensation are not property within the meaning of the Fifth Amendment. (*U. S.* v. *General Motors Corp.*, decided Jan. 8, 1945, 89 L. Ed. 379).

This Court has held highways to be property. (*St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92). The Circuit Court of Appeals in this case limits recovery to the cost of repairing and relocating such highways as were needed after the flooding of petitioner's territory and denies a recovery for all other highways taken. (R. 52). The result of this holding is that only highways needing repair or relocation are property. This seems to be in direct conflict with the controlling decisions of this Court.

(b) The decision in this case that petitioner is entitled to recover only the cost of relocation and replacement of roads necessary after the flooding of its territory by respondent seems in conflict with other applicable decisions of this Court, including:

(*Olsen* v. *U. S.* 292 U. S. 246)
(*Monogahela Navigation Co.* v. *U. S.* 148 U. S. 312)

(*McCanless* v. *U. S.* 298 U. S. 342)
(*Boston Chamber of Commerce* v. *Boston* 217 U. S. 189)
(*St. Louis* v. *Western Union Telegraph Co.* 148 U. S. 92)

At the date of the taking of the highways here involved, petitioner had physical properties consisting of easements, roadways, bridges, etc. having a cost of replacement value of $357,658.00. These properties cost in excess of $435,000.00. They were used by and useful to petitioner at the time of taking. While petitioner is under no obligation to replace these highways, the affidavits of both respondent (R. 22) and petitioner (R. 26) fix the cost of replacement at $357,658.00.

These are the only highways involved. Those highways which needed replacement or continued useful have been replaced or repaired. The contract between the parties settled liability for such roads. Nothing in that contract limits the rights of petitioner as to roads taken and not replaced or is available as a defense to respondent. (R. 10 (10)). The issue as to highways taken which do not require replacement is left for court settlement. (R. 10 (10)).

To deny to petitioner a recovery of just compensation because petitioner is not required to replace property taken from it seems to measure value by petitioner's future needs rather than by its loss at the time of taking. The fallacy of this theory is immediately apparent if applied to a public service corporation going out of business because its properties are taken. It has no need to replace its properties. It collects their value and distributes it to creditors and stockholders. To measure value by future needs of an owner of property taken is contrary to the decisions of this Court.

Such a holding also determines value after the taking and measures it by the use to which the property taken is put by the taker. Physical properties belonging to petitioner,

used by and useful to it at the time of taking, having a value of $357,658.00 at the time of taking, have both their present usefulness and value extinguished as a result of the use to which the property is put by the taker. To measure just compensation by elements resulting subsequently to and because of the taking, or by value to the taker, seems clearly contrary to the decisions of this Court.

CONCLUSION

Both the Circuit Court of Appeals and the District Court reach their conclusion by reasoning that since petitioner is under no obligation to replace the property taken from it by respondent, and since petitioner is relieved of the duty of future maintenance of the property taken, petitioner is not entitled to recover.

Neither such a line of reasoning nor such a conclusion has been announced by this Court in any previous case. It is seemingly in conflict with the reasoning and conclusions of this Court in many cases involving the measure of just compensation for the taking of private property. Just compensation to a political subdivision of a state ought not to be denied under any such unapproved theory.

It is respectfully submitted that the petition for the writ of certiorari should be granted to the end that the questions presented by the petition may be considered and decided by this Court.

Respectfully submitted.

M. W. EGERTON,
Attorney for Petitioner.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1020

JEFFERSON COUNTY, TENNESSEE, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 40–44) are not reported. The opinion of the circuit court of appeals (R. 49) is reported in 146 F. 2d 564.

JURISDICTION

The decree of the circuit court of appeals was entered on January 15, 1945 (R. 49). The petition for a writ of certiorari was filed on March 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

Whether the obligation to pay just compensation for permanently flooding a portion of a county road system is satisfied when adequate substitute road facilities are provided by agreement with the county and at the cost of the Tennessee Valley Authority, or whether there is an obligation to pay additional compensation because some of the affected roads did not need to be and were not directly replaced.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part, as follows:

> nor shall private property be taken for public use, without just compensation.

STATEMENT

This action was instituted by the petitioner to secure a declaratory judgment as to its rights, if any, arising out of the flooding of certain county highways (R. 1–4). Both parties filed motions for summary judgment in the court below on the basis of the pleadings and affidavits (R. 17, 35, 38). The district court granted respondent's motion for summary judgment and dismissed the action (R. 44–45). The circuit court of appeals affirmed (R. 49).

The material facts are not in dispute. The respondent has constructed a dam known as Doug-

las Dam in Jefferson County, Tennessee. The reservoir created by this dam inundated a portion of the county and flooded or otherwise adversely affected approximately one hundred and twenty miles of county roads. (R. 20–21.)

Respondent assumed, as it still does, that the measure of its legal liability was neither the original cost nor the reproduction cost new of the affected roads, but was the cost of restoring the county road system to a condition in which it would serve the needs of the county equally as well as it did before the reservoir was constructed. Accordingly, it made a survey of the county road system for the purpose of determining which of the affected roads would have to be replaced after the completion of the reservoir and which of the roads would no longer serve a useful purpose and could therefore be abandoned. This was the practice which it had uniformly followed in similar situations. After negotiations with the proper officials of the county, a proposed relocation plan was drawn up under which the respondent would be required to do the construction work necessary to replace all roads for which there would be any continuing need after the completion of the reservoir. (R. 19–20.)

While the county agreed that the proposed plan of relocation was satisfactory and made adequate provision for all roads which would be needed after the filling of the reservoir, it refused to ex-

ecute a formal settlement contract unless permitted to reserve whatever rights it might have to recover additional compensation because of the flooding of that portion of the road system for which there would be no continuing need after the completion of the project and as to which the county would be relieved of its legal duty to construct and maintain the roads (R. 20, 32).

Respondent agreed to this reservation, and a contract was executed which provided in substance (1) that the respondent would at its own expense construct certain designated roads which it was agreed constituted all the roads for which there would be any need under reservoir conditions, and (2) that the county would abandon all roads affected by the reservoir and release the respondent from liability except that the respondent would indemnify the county against any future claims of the traveling public or of abutting landowners. The county expressly reserved the right to recover any additional compensation to which it might be entitled as a result of the taking of the roads which were not replaced (R. 6–11).

The road construction which respondent was required to perform under this contract has been satisfactorily completed at a cost of $1,878,393, and the county now has a road system which is fully as adequate to discharge its responsibilities as that which it had before Douglas Dam was con-

structed. It has, however, eighty-four less miles of road to maintain, and the bridges and other structures constructed by the respondent will have much longer life than the structures they replaced. Accordingly, the county will save substantial sums in annual maintenance costs, and this money will be available to it for other highway improvements. (R. 22–23.) The county has been fully exonerated and saved harmless from any future burden of road construction or replacement at a cost to the Authority over five times as great as the original cost and nearly three times as great as the reproduction cost new of the flooded highways (R. 22, 38), but it contends that it should receive additional compensation on account of the flooded roads which did not need to be replaced and were not replaced (R. 4, 26).

ARGUMENT

1. The decisions of the federal courts have uniformly recognized that the only right arising from the taking of highway easements is a right of exoneration from the cost of constructing whatever substitute roads may be necessary. Just compensation to a county for roads flooded or destroyed is measured by the cost of making the necessary readjustments in its road system. *Brown* v. *United States,* 263 U. S. 78, 82–83; *Mayor and City Council of Baltimore* v. *United States,* decided February 9, 1945 (C. C. A. 4),

affirming *United States* v. *Certain Parcels of Land,* 54 F. Supp. 667 (D. Md.); *Wayne County* v. *United States,* 53 Ct. Cl. 417, affirmed, 252 U. S. 574; *Town of Nahant* v. *United States,* 136 Fed. 273 (C. C. A. 1); *United States* v. *Town of Nahant,* 153 Fed. 520 (C. C. A. 1); *Town of Bedford* v. *United States,* 23 F. 2d 453 (C. C. A. 1); *United States* v. *Wheeler Township,* 66 F. 2d 977 (C. C. A. 8); *United States* v. *Alderson,* 53 F. Supp. 528 (S. D. W. Va.).

The policy behind these decisions is clear. Roads have no market value. They are of value to a county only to the extent that they enable it to meet its obligations to its citizens. Neither the original cost nor the reproduction cost new of the roads destroyed bears any relation to the amount of the loss. The readjustment of its road system may cost the county substantially more or substantially less than the reproduction cost of the affected roads. If more, the county would not be made whole by a payment based on the reproduction cost of the flooded roads; if less, it would receive an unwarranted windfall. The soundness of this doctrine is illustrated by the present case. The original cost of all roads affected by the construction of the Douglas project was only $341,439 (R. 22). The reproduction cost of these roads was $671,564 (R. 22). The actual cost, and the reasonable cost, of readjusting the county road system, as performed and completed by respond-

ent, was $1,878,393 (R. 22). If petitioner had been compensated for all of its flooded roads in accordance with the theory it now advances, i. e., on the basis of reproduction costs, it would have been paid only $671,564, or over a million dollars less than the amount needed to make it whole.

2. Petitioner contends that the decision of the court below is in conflict with the principles enunciated in *Olson* v. *United States,* 292 U. S. 246; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *McCandless* v. *United States,* 298 U. S. 342; *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189; and *St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92 (Br. 15). It is asserted to be in conflict with *Olson* v. *United States, supra,* on the ground that "value is not diminished nor compensation reduced by any element resulting subsequently to or because of the taking" (Br. 6). It is petitioner's theory that the court cannot look at the situation which will exist after the taking to determine whether the county has been fully compensated for its loss. This contention is contrary to the well established rule applicable in all cases involving a partial taking. In such cases, the court always looks at the situation which will exist after the taking to determine the extent to which the owner has been damaged. If the use to which the land taken will be put increases the value of the remainder, the compensation to which the owner is entitled will be less than the value of the

land taken (*Bauman* v. *Ross,* 167 U. S. 548). So, also, if the use to which the land taken is put decreases the value of the remainder, the compensation to which the landowner is entitled is a sum greater than the value of the land taken (*Sharp* v. *United States,* 191 U. S. 341). The court looks at the situation before the taking and the situation after the taking and compares the two for the purpose of determining what will constitute just compensation. This is exactly what was done by the court below. A part of the county road system was flooded. The court compared the situation before the taking with the situation after the taking and determined that the county had been fully compensated by the construction work performed by respondent.

The decision of the court below is asserted to be in conflict with the decision in *McCandless* v. *United States, supra,* on the ground that "Value may reflect the use to which the property is presently devoted" (Br. 6). Surely that is exactly what the judgment in this case does reflect. The asserted conflicts (Br. 6–7) with *St. Louis* v. *Western Union Telegraph Co., supra,* and *Boston Chamber of Commerce* v. *Boston, supra,* are equally baseless, for the court below recognized that highways are property within the meaning of the Fifth Amendment (*Western Union* case), and that "the question is what has the owner lost, not what has the taker gained"

(*Boston* case, p. 195). The decision below is based on the fact that the county has been fully compensated for its loss.

The theory on which petitioner contends that the decision of the court below conflicts with *Monongahela Navigation Co.* v. *United States, supra,* is nowhere stated by petitioner, and we are at a loss to perceive any basis for this contention.

CONCLUSION

The decision of the court below is in accordance with established principles of law. It is entirely consistent with the cases heretofore decided by this Court, and there is no conflict of decisions. It is respectfully submitted that the petition should therefore be denied.

CHARLES FAHY,
Solicitor General.
THOMAS J. GRIFFIN,
Solicitor,
CHARLES J. MCCARTHY,
Assistant General Counsel,
Tennessee Valley Authority.

MARCH 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1020

JEFFERSON COUNTY, TENNESSEE,
Petitioner,

vs.

TENNESSEE VALLEY AUTHORITY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF JEFFERSON COUNTY, TENNESSEE

It is respectfully submitted that the brief on behalf of the respondent is based upon evidence contained in parts of affidavits specifically excluded by the District Court and not now before this Court.

The District Court ruled:

> "By the terms of the contract between the plaintiff County and defendant Authority, it is provided that nothing in the contract releases or may be pled in defense to any action by the County.
>
> "The Court is therefore of the opinion that evidence of the extent and value of the work done by the defendant Authority under its contract with Jefferson County is inadmissible under the terms of the contract between the County and the Authority, and those parts of the affidavit of Frank W. Webster dealing with the char-

acter, value and extent of the work done by the Authority under the contract are excluded." (R. 42).

The Court then excludes from consideration affidavits concerning work done under the contract and sets out in detail those parts of the affidavits so excluded.

No exception to this ruling has been pressed and no error was assigned to this action. Therefore, evidence of the cost and character of roads rebuilt under the contract is not before this Court.

The question remains whether or not the Tennessee Valley Authority is liable for the taking of some 95 miles of road which cannot and will not be replaced and for the replacement of which no duty rests upon the County. (R. 42).

This was the question which was reserved in the contract. The theory then held by the respondent was that no liability existed for such a taking. (R. 10, Par. 10). The petitioner thought otherwise. (R. 10, Par. 10).

Each road taken by respondent is and was a unit. County roads are not built at one time or as a system. Where there is a replacement of a road taken, there is exoneration of the County from any duty to reconstruct and this satisfies the liability of the taking authority. No appellate court has gone further than this in any holding known to petitioner.

But where a road is taken and not reconstructed, exoneration can be brought about only as the value of the property taken is paid to the owner of the road.

The brief on behalf of respondent, to the extent that it relies upon matters excluded from the record as herein pointed out, should not be considered by the Court.

Respectfully submitted,

M. W. Egerton,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1020

JEFFERSON COUNTY, TENNESSEE,
Petitioner,

vs.

TENNESSEE VALLEY AUTHORITY

PETITION FOR REHEARING

M. W. EGERTON,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1020

JEFFERSON COUNTY, TENNESSEE,
Petitioner,

vs.

TENNESSEE VALLEY AUTHORITY,
Respondent

PETITION FOR REHEARING

To the Honorable the Supreme Court of the United States:

Comes now Jefferson County, Tennessee, petitioner in the above entitled cause, and presents this its petition for a rehearing of the action of the Court in denying its petition for a writ of certiorari and respectfully urges the Court to rehear and grant this writ.

I

In the brief filed herein on behalf of the respondent, the respondent undertakes to present as its defense to this action work done by it in replacing certain roads located within the territorial boundaries of petitioner where the replacement and reconstruction of these roads was made

necessary by reason of flooding caused by respondent. The picture of the situation as presented by respondent is that respondent at great expense has reconstructed and replaced roads belonging to petitioner; that the cost of replacing these roads was in excess of their value; that the amount expended by respondent in replacing these roads should be accepted as a satisfaction of the liability of respondent to petitioner.

A copy of this brief was served on petitioner on April 3, 1945. Promptly upon receipt of a copy of the brief on behalf of respondent, petitioner prepared for printing a reply brief pointing out to the court that the position taken by respondent was without support in the record and contrary to the contract between the parties.

The sole question in this case is "*whether or not the Tennessee Valley Authority is liable in damages for the taking of some 95 miles of other roads which cannot and will not be replaced and for the replacement of which no duty rests upon plaintiff County*" (R. 42).

At the hearing in the District Court, affidavits were offered showing the extent of the work done by respondent under its contract with the County. Objection was made to the consideration of this evidence. The District Court ruled:

> "By the terms of the contract between the plaintiff County and defendant Authority, it is provided that nothing in the contract releases or may be pled in defense to any action by the County.
>
> "The Court is therefore of the opinion that evidence of the extent and value of the work done by the defendant Authority under its contract with Jefferson County is inadmissible under the terms of the contract between the County and the Authority, and those parts of the affidavit of Frank W. Webster dealing with the character, value and extent of the work done by the Authority under the contract are excluded" (R. 42).

The Court then excludes from consideration affidavits for work done under the contract and sets out in detail those parts of the affidavits so excluded.

No exception to this ruling has been pressed and no error was assigned to this action. Therefore, evidence of the cost and character of roads rebuilt under the contract is not before this Court and under the contract between the parties cannot be before this Court, for the contract itself provides "nothing in this agreement shall operate to release any such right or be pled in defense to any suit brought by the County to recover damages for any such taking" (R. 10).

And the contract further provides: "it is the contention of the Authority that it is not legally liable for the taking of any such right of way or road and that no provable damage arises from any such taking, while the County contends that it suffers substantial damage due to such taking for which the Authority is liable."

It follows, therefore, that the sole question in this Court is whether the respondent is liable to petitioner for taking roads valued at $357,658.00 which have not been replaced and could not be replaced by reason of the flooding of the territory which they served by the backwaters of a dam constructed by respondent.

The fact that it is not necessary to rebuild the roads does not restore to the County the value of the roads taken.

The County had property with a value of $357,658.00 *in addition* to roads serving territory not flooded. It now has roads serving territory not flooded but it has lost $357,658.00. The County specifically declined to enter into an agreement with respondent which sacrificed this $357,658.00 and the contract which was finally accepted fully protects this right and respondent agreed that nothing done should destroy this right of the County. If roads are property, then the County has had taken from it $357,658.00 for which it has not been paid.

The theory advanced by respondent in its brief, that payment for roads requiring replacement is a satisfaction of all liability of respondent to petitioner, completely ignores the contract between the parties and there is no evidence in the record under the ruling of the District Court to support any such contention.

On the other hand, if the Court is to hold that roads are not property within the meaning of the Fifth Amendment of the Constitution, as was held by the District Court and the Circuit Court of Appeals by their holding that no liability exists for such a taking, then the Court must overrule its decision in *St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92.

The decision of the Court denying the writ of certiorari in this case was announced on April 9, 1945, and although petitioner acted promptly to call the attention of the Court to the fact that Respondent's theory as advanced in its brief was contrary to the contract between the parties and the record, this reply brief did not reach the Court in time to be considered prior to the announcement of its decision.

II

Petitioner is a public corporation of the State of Tennessee. It has no stockholders and no private gain or purpose to serve. In good faith and in an endeavor to cooperate with a corporation of the United States, it enters into a contract with that corporation reserving to itself the right to recover the value of roads taken by such a corporation and specifically providing in its contract that the replacement of roads taken, to the extent that they were replaced, should not constitute a defense to an action for roads taken and not replaced.

No decision of the Supreme Court of the United States has yet denied to a private corporation the right to recover the value of property taken from it by the United States or

any of its agencies. The question of the measure of damages and liability for the taking of roads by an agency of the United States is now pending in the States of California, Texas, Kentucky, West Virginia and perhaps others unknown to petitioner. If roads are not property and no liability therefor exists for their taking, the various states and their agencies should be so advised by an authoritative decision of this Court.

III

Counties build roads not for the service of a particular part of the county alone, but for all of the county. The cost of construction is a county-wide cost, not just a cost assessed against abutting property owners. Where its roads are taken, the loss does not fall upon the abutting property owners (and particularly is this true where the abutting property is freed from liability for taxation by passing into the hands of the Federal Government), but it falls upon the remaining property owners of the county. Their loss is real. Their property right has heretofore been recognized by this Court. To deny it and to deny a recovery for the taking of its property is a factual injustice to the corporate taxpayers who have paid for the property or who must continue to pay therefor in discharging bonds outstanding.

Petitioner is unable to accept such a factual injustice as being in accordance with the provisions of the Fifth Amendment of the Constitution.

Petitioner, therefore, most earnestly prays that this Honorable Court rehear its application for a petition for certiorari: (1) Because respondent in its brief adopted and presented to this Court a theory contrary to the contract between the parties and based upon evidence specifically excluded from the record by the District Court; (2) Because the matter involved is of public interest, not alone to peti-

tioner but to others having similar problems in many other States; (3) Because the factual injustice done to petitioner as a public body should not stand as the law of the land in the absence of full consideration by this Honorable Court; and (4) For the reasons in the original petition set out.

Respectfully submitted,

M. W. EGERTON,
Counsel for Petitioner.

I, M. W. Egerton, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

M. W. EGERTON,
Counsel for Petitioner.

(7728)